joints which undermined the foundation and caused failures in the sewer system (Def. App. 4a–10a).

At the hearing before the House Judiciary Committee, the City contended, but the Department of the Army denied, that as a result of the construction of the dam the pool elevation of the Allegheny River at Ford City was raised above the pre-dam ordinary high water mark. The committee stated that, because of these conflicting views and the question of damages, it recommended that jurisdiction be conferred on the court to determine the questions presented (Def. App. 20a–22a).

The case was tried before the district court primarily on the issue of the location of the pre-dam ordinary high water mark. The district court found that the pre-dam ordinary high water mark at Ford City was 766.8 feet m.s.l. (Pet. App. 25). The district court relied exclusively on the testimony of plaintiff's witness, Shannon. Defendant moved to strike Shannon's testimony on the ground that he relied on improper elements in determining his estimate of the location of the ordinary high water mark (Def. App. 105a). The court of appeals reversed the district court's ruling on the ground that Shannon's testimony should have been disregarded because it was predicated on a legally erroneous premise (Pet. App. 43). The court of appeals also determined that this case did not come within the rule of *United States v. Kansas City Ins. Co.*, 339 U.S. 799.

ARGUMENT

The decision of the court of appeals is correct, and in accord with the decisions of this Court. There is

no conflict between circuits. Accordingly, there is no occasion for further review.

1. The primary question to be determined in this case was the location of the pre-dam ordinary high water mark. Plaintiff's witnesses predicated their testimony on the erroneous premise that the line where vegetation ceases to exist is the sole determinant of the ordinary high water mark. The court of appeals, in reversing the district court, correctly ruled (Pet. App. 43):

> This is not a question of credibility of witnesses or weight of evidence. It is simply that Shannon's opinion evidence of situs of the post-dam ordinary high-water mark was totally predicated on a legally wrong premise. The test for ascertaining that mark passed along to him for his use was erroneous. The trial judge, forming his conception of the mark from the same source, accepted Shannon's findings and rested his decision completely on those findings. In this resultant situation reversal of the judgment and remand of the matter to the district court for the entry of judgment in favor of the defendant-appellee is indicated.

This, we submit, completely answers petitioner's claim that the court of appeals improperly invaded the trial court's province by passing on the weight of the evidence (Pet. 13–14). The factors looked to by the court of appeals in determining the ordinary high water mark are those that have been approved by the courts generally. They included the vegetation line, the line the eye traces in going either up or down a river, the litter line, the shelving action of the river,

etc. (Pet. App. 34–42). This eclectic test is in accord with, rather than contrary to, the one case with which petitioner claims there is a conflict (Pet. 14).

2. Since the court of appeals correctly found that the post-dam ordinary high water mark was *not* higher than the pre-dam ordinary high water mark, the principle that the federal government may raise the level of a navigable river and maintain it at the ordinary high water mark without being responsible for consequential damages is applicable. *United States* v. *Kansas City Ins. Co.*, 339 U.S. 799, 805; *United States* v. *Willow River Co.*, 324 U.S. 499, 510; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 596–597; *Gibson* v. *United States*, 166 U.S. 269. The only items of damage here were consequential. The United States did not take petitioner's sewers; the City has used and continues to use its sewer system. To be sure, it has been subjected to increased cost of maintenance and has had to rebuild some of its lines, but these are items of consequential damage, and not a taking under the Fifth Amendment. As stated in *United States* v. *Chicago, M., St. P. & P. R. Co.*, *supra*, at page 597:

> The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.

United States v. *Kansas City Ins. Co.*, *supra*, on which petitioner relies, does not control this situation. In that case this Court held that the United States must compensate for damage to agricultural land

located on a nonnavigable tributary one and one-half miles upstream from the navigable river, where the damage was caused by a dam which maintained the navigable river continuously at the ordinary high water mark. The Court's theory was that the navigation servitude of the United States does not extend beyond the bed of the navigable river (339 U.S. at 806). But petitioner here is not located beyond the bed of a navigable stream. Petitioner, rather, is a city that is bounded by the navigable Allegheny (Pet. 4), and has dumped its sewage directly into that navigable stream since 1898. As the court of appeals pointed out (Pet. App. 48), "what we have in this appeal is fairly and plainly a sewer system that is a riparian location unit. It is an operation conceived to take advantage of the use of the flow of a navigable stream. It is utterly dependent on the Allegheny. It owes its existence and entire function to that navigable river. * * * [And] there is not one word of testimony that any Ford City fast land whatsoever was harmed in the slightest."

The standard applied by the court of appeals, which conforms to that of the other circuits and the Court of Claims (see *City of Eufaula, Alabama* v. *United States,* 313 F. 2d 745 (C.A. 5); *City of Demopolis, Alabama* v. *United States,* 334 F. 2d 657 (C. Cls.)), follows from this Court's decision in *United States* v. *Virginia Electric Co.,* 365 U.S. 624, where the Court made clear that there is no duty to compensate for damage to uses of the land which have value only "in connection with the flow of the stream" (p. 630)—

such as "value, derived from the location of the land, [which] is attributable in the end to the flow of the stream" (p. 629). Here, the only values impaired by the government's building a dam which raised the river's level within the ordinary high water mark derived from the fact that petitioner's sewage system was designed to take advantage of the flow of the navigable river.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
EDWIN L. WEISL, JR.,
Assistant Attorney General.
ROGER P. MARQUIS,
HOWARD O. SIGMOND,
Attorneys.

SEPTEMBER 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965